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Submitted via FOIA Online (<https://foiaonline.regulations.gov>)

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Request Under Freedom of Information Act (Fee Waiver/Limitation Requested)

Dear Freedom of Information Officer:

Ecological Rights Foundation ("EcoRights"), via their public interest counsel at Environmental Advocates, requests all documents constituting, memorializing, explaining or commenting upon the following:

- (1) All documents created by or provided to the U.S. Environmental Protection Agency or any employee or official of the U.S. Environmental Protection Agency (collectively "EPA") since January 20, 2017 constituting or memorializing any directive, instructions or request related to any new policy, procedure, practice, or rationale for drug testing EPA employees. This request shall also include any and all emails, documents, or correspondence reflecting an EPA employee's complaint, protest, objection, or question related to the frequency or rationale for drug testing.
- (2) All documents created by or provided to EPA since January 20, 2017 constituting, memorializing, explaining or commenting upon any and all communications by outgoing EPA employees, including emails, memorandums, letters, or any other documents that include rationale, explanations, or communications related to an employee quitting, retiring, or receiving a buy-out to leave the EPA (hereinafter "Resignation Letters"). This request shall also include any and all communications related to such Resignation Letters between presidential appointees of the Trump administration (including but not limited to

Administrator Pruitt and any other presidential appointee within the EPA) and EPA employees.

- (3) All documents created by or provided to EPA since January 20, 2017 constituting, memorializing, explaining or commenting upon any and all communications between presidential appointees of the Trump administration (including but not limited to Administrator Pruitt and any other presidential appointee within the EPA) and EPA employees and any and all internal communications between EPA employees constituting, memorializing, explaining or commenting upon the effect of reductions in the workforce on the agency's work product. This request shall include, for example, memorandums analyzing the reduction in the workforce on work product outcome, and any documents that include policies or procedures for dealing with the reduction in the workforce. For example, this request includes any communications stating that the agency will reduce any particular deliverable or work task—including but not limited to referrals of matters to the United States Department of Justice for bringing judicial enforcement actions, administrative orders, reduced frequencies of reviewing state programs, reduced field inspections to evaluate facilities compliance with environmental laws and regulations, reduced review of permit decisions issued by state agencies (such as reduced review of NPDES permit decisions by state agencies), reduced review of state water quality standards adopted under the Clean Water Act, review of standards or limitations adopted under the Clean Water Act (such as Clean Water Act effluent limitations guidelines), Clean Air Act (such as National Ambient Air Quality Standards, New Source Performance Standards, or NESHAPs), or the Safe Drinking Water Act (such as maximum contaminant levels). This request also includes any documents related to how EPA will reallocate personnel, reallocate funding, or reduce work product obligations in order to accommodate the reduced staff size. This request also includes documentation of how many staff are assigned currently to do Freedom of Information Act work in headquarters and any reassignments or reductions in personnel since January 20, 2017.
- (4) All documents created by or provided to EPA since January 20, 2017 constituting, memorializing, explaining or commenting upon any and all communications between presidential appointees of the Trump administration (including but not limited to Administrator Pruitt and any other presidential appointee within the EPA) and EPA employees and any and all internal communications between EPA employees constituting, memorializing, explaining or commenting upon any goal or policy to reduce staff size at the EPA. This request shall include any related policies to entice staff to leave, such as utilizing retirement packages or buy-outs to encourage staff to leave the agency. This request shall also include any documents related to targeting employees for leave packages based on their political views or expressions or lack of support for the Trump administration.

We trust that the government will reach a determination on this request within FOIA's twenty working day deadline and will limit any possible withholding to those documents that the government can meet its burden to show are truly exempt from disclosure and the release of which would cause foreseeable harm.

For purposes of this request "documents" means "all written, typewritten, drawn or printed material or record of any type or description and all information kept or recorded on magnetic or electronic media, including, without limitation, correspondence, letters, agreements, contracts, memoranda of agreement or understanding, electronic mail (including both messages sent and received from government personnel), telegrams, inter- and intra-office communications, forms, reports, studies, working papers, handwritten or other notes, phone records, logs, diaries, minutes, spreadsheets, computation sheets, data sheets, transcripts, drawings, sketches, plans, leases, invoices, index cards, checks, check registers, maps, charts, graphs, bulletins, circulars, pamphlets, notices, summaries, books, photographs, sound recordings, videotapes, rules, photocopied or computer-related materials, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations of them, and all forms of written or recorded matter to which [the government has] access or of which [the government has] any knowledge").

FOIA requires that an agency disclose documents to any person except where the document falls under a specifically enumerated exemption. 5 U.S.C. § 552 (2002). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"; "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (U.S. 2001) (internal citations omitted). The courts have emphasized the narrow scope of these exemptions and "the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). Further, under the recent amendments, 5 U.S.C § 552(a)(8)(A) now provides that (1) an agency shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b) or disclosure is prohibited by law; (2) the agency shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (3) the agency shall take reasonable steps necessary to segregate and release nonexempt information.

Thus, the government has a duty in preparing responses to EcoRights' FOIA request not to withhold documents unless foreseeable harm exists, to consider partial disclosure, and to take reasonable steps to segregate nonexempt information. Exemptions are read narrowly and the government bears the burden of proving exemptions apply. 5 U.S.C. § 552(a)(4)(b); see *Milner v. Dep't of the Navy*, 562 U.S. 562, 563 (U.S. 2011). Agencies "should not withhold information simply because [they] may do so legally. . . For every request, for every record reviewed, agencies should be asking 'Can this be

released?’ rather than asking ‘How can this be withheld?’” *See also Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 700 (9th Cir. 1989) (“The exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the FOIA exemptions.”)

We request that the government provide electronic copies of its response to this request – as well as any responsive documents that may be transmitted via e-mail – to me at the following e-mail addresses:

Christopher Sproul: csproul@enviroadvocates.com

Heather Kryczka: heather@enviroadvocates.com

Molly Coyne: mcoyne@enviroadvocates.com

Please send any documents that must be sent via regular mail to the following address:

Christopher Sproul
Environmental Advocates
5135 Anza St.
San Francisco, California, 94121

Your staff may contact me at (630) 544-9977 or heather@enviroadvocates.com to further discuss your response to this request. Thank you for your prompt attention to this matter.

Sincerely,



Heather Kryczka
Counsel for Ecological Rights Foundation

Attachment 1
Fee Waiver Request

Attachment to Freedom of Information Act (FOIA) Request Letter: Fee Waiver Request

Pursuant to 40 C.F.R. section 2.120(d), the U.S. Environmental Protection Agency (EPA) applies a six factor test in determining whether to grant a fee waiver for FOIA requests. Ecological Rights Foundation (“EcoRights”) addresses each of these six factors below. As demonstrated below, EcoRights should be granted a fee waiver.

1. The subject matter of the requested records must specifically concern identifiable operations or activities of the government. A request for access to records for their informational content alone does not satisfy this factor.

EcoRights’ Response: EcoRights’ FOIA request seeks several specific categories of documents relating to the policies and practices of the Environmental Protection Agency (EPA) since the inauguration of President Trump on January 20, 2017, particularly related to the reduction in staff size at the EPA. First, EcoRights seeks documents related to any changes in drug testing policies and procedures. Second, the request seeks Resignation Letters from former EPA employees that have resigned since January 20, 2017, and any discussion of such Resignation Letters by Trump Administration officials or EPA employees. Third, the request includes any internal policies for reallocating resources due to a sharp reduction in staff since January 20, 2017. Fourth, EcoRights seeks documents related to EPA Administrator Pruitt’s stated goal of reducing the staff size of the agency, and any policies related to inducing staff to retire, quit, or take buy-outs, particularly any targeting of employees related to their political views. Accordingly, EcoRights’ request meets this criterion.

2. For the disclosure to be likely to contribute to an understanding of specific government operations or activities, the releasable material must be meaningfully informative in relation to the subject matter of the request.

EcoRights’ Response: The documents EcoRights request constitute the best available evidence of the circumstances surrounding the mass departure of EPA employees leaving the agency since the inauguration of President Trump, as well as the reasons for their departures. The documents EcoRights requests also constitute the best available evidence of how EPA and the Trump Administration plan to reallocate funding, personnel and resources in order to accommodate the drastic reduction in staff size in the agency. These documents will inform EcoRights and the public of the potential cuts to programs and enforcement activities, revealing any areas of underenforcement and potential public health risks, and thus highlighting any gaps for citizens to intervene with citizen suits. The documents will also reveal whether EPA and/or Trump Administration officials are targeting employees for drug testing based on their political views; and whether EPA and/or Trump Administration officials are targeting EPA employees with buy-outs, retirement packages, or otherwise inducing them to leave the agency based on their political views. Such documents will shed light on whether the agency’s policies are

having a chilling effect on employees and hindering their ability to effectively implement the nation's environmental laws.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. One's status as a representative of the news media alone is not enough.

EcoRights' Response: Disclosure of the documents will promote the understanding of the general public in a significant way because EcoRights will analyze the information and make its conclusions known to our members, other environmental groups nationwide, and the public at large via press releases and by posting our analyses of the information on one or more internet web sites or citizen group email broadcast "systems," such as the Clean Water Action Network. There has been significant environmental group and media focus on employees leaving the EPA, that the EPA's staff size is the smallest it has ever been since the Reagan Administration, and that Administrator Pruitt has a goal of shrinking the staff size even further and instituting a hiring freeze. Due to the drastic reduction in staffing, the agency will no longer be able to conduct the same activities as it has in the past. These documents will reveal how EPA is planning to reallocate staff, funding, enforcement activities, and prioritization of programs in order to accommodate the reduced staff size. These reallocations could have serious consequences for public health, depending on what programs are cut. The documents that EcoRights requests will also reveal to the public whether the current administration is targeting EPA employees based on their political views, and in doing so whether the agency is having a chilling effect on employees' abilities to carry out the full extent of the nation's environmental laws. The public has a strong interest in finding out how this effort is designed to affect enforcement of environmental laws as part of an overall approach of modifying environmental laws and programs to create a more favorable business climate for certain business sectors. The documents requested will allow EcoRights to provide meaningful "hard" data to the environmental community and the media on these topics.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities.

EcoRights' Response: Disclosure of the requested information will significantly contribute to public understanding of government operations. Specifically, the information will demonstrate whether EPA is downsizing in staff in order to hinder the enforcement of environmental laws. This will further enhance public understanding of the ability of EPA employees to execute their duties and to assess the capacity of the EPA as an agency overall to fulfill its obligations to enforce and implement federal environmental laws.

In addition, disclosure of the requested information will enhance public understanding of whether or not the EPA is targeting employees with drug testing and/or inducements to leave the agency on the basis of their political views and expressions. Bringing to light these activities will enhance public understanding of whether the agency is intimidating

EPA employees based on political preferences. This will enhance the ability of the public to hold the agency accountable for any improper targeting of employees.

Threats to our environment such as water and air pollution adversely affect millions of people throughout the United States, and adequate, efficient implementation and enforcement of environmental laws is critical for the public health of millions. EcoRights has a demonstrated ability to disseminate the problematic features of government activities to a wider public audience, by litigation as well as the other means. Factors indicating an ability to disseminate information to the public include publication on an organization's website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

EcoRights' analyses will be disseminated via press releases as well as posted on EcoRights' web sites (<http://www.ecorights.org>) and likely the web sites of other environmental groups. EcoRights has a proven track record of obtaining press coverage of the environmental issues it publicizes. Generally, EcoRights obtains press coverage in the local and national media, including newspapers and radio stories. For example, EcoRights' recent filing of an ESA citizen suit concerning Stanford University's operations in the San Francisquito Creek watershed was covered by several San Francisco Bay Area newspapers, KQED radio, and a local television station. EcoRights regularly issues press releases and includes them on its website. EcoRights has demonstrated its ability to disseminate information to the public, as evidenced by its upkeep of its website and social media, its mention on other environmental groups' websites, and its ability to attract press coverage for its various lawsuits.

5. The extent to which disclosure will serve the requester's commercial interest, if any.

EcoRights' Response: EcoRights is a community-based educational nonprofit corporation committed to the protection, preservation, and restoration of the environment and endangered and threatened species. For over 15 years, EcoRights has been devoted to furthering the rights of all people to a clean, healthful, and biologically diverse environment. To further EcoRights' environmental advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal water quality and wildlife laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. Accordingly, EcoRights has no commercial interest in the information requested. EcoRights seeks the information solely to determine the effect of the current EPA's policies related to inducing a reduction in staff size, adapting to a reduction in staff size, and the relationship to a downsized staff to EPA's ability to implement its statutory duties. This information will therefore aid in EcoRights' efforts to advocate that the appropriate state, federal, or private entities take needed actions to protect our environment and natural resources.

EcoRights has no financial interest in the information sought or any enforcement actions that may result. EcoRights' goal in urging enforcement of environmental laws is not private financial gain, but rather vindication of the larger public interest in ensuring that

the EPA is operating in such a way that it can achieve compliance with environmental laws designed to protect our environment, wildlife, health, and natural resources.

6. The extent to which the identified public interest in the disclosure outweighs the requester's commercial interest.

EcoRights' Response: EcoRights has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information discussed above necessarily outweighs any commercial interest in this request. For the above reasons, EcoRights respectfully requests a fee waiver pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(k) for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

We also base our request for a fee waiver on the following additional authorities.

The law **requires** that records be furnished without charge or at a reduced charge when requesters are able to demonstrate that (1) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(4)(a)(iii); 40 C.F.R. 2.107(l)(1); *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003) [emphasis added].

(a) **Rule of liberal construction.** FOIA's fee waiver provision is to be liberally construed in favor of noncommercial requesters. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The major purpose of the 1986 amendments was to remove roadblocks and technicalities that agencies have used to deny fee waivers. *McClellan*, 835 F.2d at 1284. A request for fee waiver need only be reasonably specific and nonconclusory. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

Requesters make a prima facie case for a fee waiver when they specify why they want the administrative record, what they intend to do with the information, and to whom they will distribute the information. *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997). The burden then shifts to the agency to establish that the denial is warranted. *Id.* In denying a fee waiver request, the agency may not "hang [its] hat on a single factor" but must assess all of the pertinent factors. *Id.* Moreover, a reviewing court owes no particular deference to an agency's restrictive interpretation of FOIA. *See Tax Analysts v. Commissioner*, 117 F.3d 607, 613 (D.C. Cir. 1997).

(b) **Public interest purpose.** EcoRights falls squarely within the category of "public interest" requesters intended to benefit from the 1986 amendments of FOIA, which expanded FOIA fee waiver provisions. This amendment was intended precisely to

facilitate informational access by citizen watchdog groups that will monitor and challenge government activities. *See Better Govt. Ass'n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Indeed, this provision should be construed as a presumption that such requesters are entitled to a fee waiver, especially if the requesters will publish the information or otherwise make it available to the general public. *See Ettlinger v. Fed. Bureau of Investigation*, 596 F.Supp. 867, 873 (D. Mass. 1984).

The legislative history of the fee waiver provision indicates that “A requester is likely to contribute significantly to public understanding if the information is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H94646 (Reps. English and Kindness). Courts have cited this legislative intent as a standard for determining that a requester qualifies for a fee waiver. *See McClellen*, 835 F.2d at 1284-86.

For the above reasons, EcoRights respectfully requests pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 40 C.F.R. section 2.120(d) a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents.